

AL-MAJALLA AL AHKAM AL ADALIYYAH (The Ottoman Courts Manual (Hanafi))

BOOK XV. EVIDENCE AND ADMINISTRATION OF OATH.

INTRODUCTION

TERMS OF ISLAMIC JURISPRUDENCE.

- 1676. Evidence consists of the adduction of reliable testimony.
- 1677. Conclusively substantiated evidence consists of statements made by a number of persons where it would be contrary to reason to conclude that they had agreed to tell a lie.
- 1678. Property owned in absolute ownership is property the ownership of which is not limited by a restrictive cause of ownership, such as inheritance or purchase. Ownership which is limited by any such cause is also called indirect ownership.
- 1679. A person in possession is a person who effectively possesses a specific piece of property, or a person acting as owner of and disposing of property held in absolute ownership.
- 1680. An outsider is a person who does not exercise possession over or dispose of property as mentioned above.
- 1681. Tendering the oath consists of administering the oath to one of the parties.
- 1682. Administration of the oath to both parties consists of putting both parties on oath.
- 1683. By maintaining an existing state of affairs is meant giving judgement for matters to continue as they are. It is in the nature of confirmation. Confirmation also means giving judgement for the continuation of a well ascertained matter, the non- existence of which is not suspected, by which is meant maintaining matters as they were.

CHAPTER 1. NATURE OF EVIDENCE.

SECTION 1. DEFINITION OF EVIDENCE AND NUMBER OF WITNESSES.

- 1684. Evidence consists of the giving of information by a person in Court and in the presence of the parties by employing the word "evidence", that is to say, by saying formally: "I give evidence", in order to prove the existence of a right which one person seeks to establish against another. * *(The translation of certain technical terms has been omitted, as having no meaning for the English reader.)
- 1685. In civil cases, evidence is only valid when given by two males, or one male and two females: but in places where males cannot be possessed of necessary information, the evidence of females alone will be accepted in respect to property.
- 1686. Evidence of the dumb and the blind is not receivable.

SECTION II. THE MANNER OF GIVING EVIDENCE.

- 1687. Evidence not given at the trial is invalid.
- 1688. Witnesses must personally have seen the thing with regard to which they give evidence and must testify accordingly. The giving of hearsay evidence that is to say, evidence of what the witness has heard other people say, is inadmissible. But if a witness has heard other people say, is inadmissible. But if a witness states that he has heard from a reliable source that a certain place has been dedicated to pious purposes, or that a certain person is dead, that is to say, if he gives evidence of such fact because he heard it from a reliable source, such evidence is accepted. In matters of state administration, death and paternity, a person may give hearsay evidence without stating that he is giving hearsay evidence, that is to say, without stating that he is saying what he has heard.yvT j Example:- A states that he he knows that B was governor or judge of the town at a certain date or period, or that B died at a certain time, or that B is the son of C. If A gives such evidence definitely without stating that it is hearsay, even though he has not investigated such matters and his age is such that he could not examined them, his evidence is accepted. Similarly, if A fails to state he is giving hearsay evidence and although such evidence has not been the subject of investigation by him, nevertheless, such evidence shall be accepted, if A states that such a thing is common knowledge with the people.
- 1689. If the witness fails to employ the formula: "I give evidence" and contents himself with saying that he knows a thing to be so, or if he states that he gives information, such statement is not considered to be evidence. Should the Court, however, thereupon ask the witness whether that is his manner of giving evidence and the witness replies in the affirmative, the statement becomes good evidence. Should it be necessary merely to verify or ascertain certain things, as for example in the case of reports furnished by experts, the word "evidence" need not be mentioned, since such reports merely contain information and not legal evidence.
- 1690. If the person in whose favour or against whom evidence is being given, and the thing about which evidence is being given, are present and if the witness points to the three of them, this shall be considered to be sufficient identification. There is no necessity to state the names of the father and grandfather of the persons for or against whom evidence is given. If the evidence relates to a deceased person, however, or an absent principal, the witness must state the names of such person's father or grandfather. But in the case of a person who is of high repute and well known, it is sufficient for the witness to state such person's name and description, since the real object is to describe him in such a way as to distinguish him from other persons.
- 1691. When giving evidence as to real property, the boundaries of such property must be stated. If the witness is unable to mention the boundaries of the real property with regard to which evidence is given, but states that he could indicate them on the spot, he shall proceed to the spot and there indicate the boundaries.
- 1692. Should the plaintiff bring an action based upon the boundaries set forth in his title deed, in accordance with the terms of Article 1623, witnesses may validly give evidence that such a person is the owner of the property, the boundaries of which are set forth in the title-deed.
- 1693. If a person brings an action to recover a sum of money owing to the person from whom he has inherited by some other person, it is sufficient if the witnesses give evidence that the sum of money is question was owing to the deceased by such person. There is no necessity to state that such sum has been inherited by the heirs. Should some specific thing be the subject of the claim and not the debt, that is to say, should a definite piece of property belonging to the testator be claimed, which is in the possession to the testator be claimed, which is in the possession of such person, the case will be decided in the same manner.
- 1694. If a person brings an action to recover a sum of money from the estate of a deceased person, witnesses may validly give evidence that such a sum of money is due to that person by the deceased. There is no necessity to state that the money was owing up to the time of his death. The same rule applies if an action is brought to recover certain property and not a debt, that is to say, when the plaintiff brings an action to recover property of his own in the possession of the deceased.
- 1695. If a person brings an action to recover a sum of money due from some other person, witnesses may validly give evidence that such a sum is owing by the latter to the plaintiff. If, however, the defendant puts in issue the question as to whether the debt is still due, witnesses may not validly state that they have no information as to whether the debt is still due or not.

SECTION III. FUNDAMENTAL CONDITIONS AS TO THE GIVING OF EVIDENCE.

- 1696. A condition precedent to giving evidence in civil cases is the institution of an action.
- 1697. Evidence which is contrary to obvious facts is inadmissible. Example:- If A has been seen alive, or a house has been seen to be in good condition, evidence that such person is dead, or that such house has fallen into disrepair is not admissible.
- 1698. Evidence of facts contrary to what is proved by conclusively substantiated evidence is inadmissible.

- 1699. The legal object of evidence is to prove a right. consequently, purely negative evidence is inadmissible, as where someone states that a certain person did not belong to a certain person, or that someone is not in debt to a certain person.

Conclusively substantiated evidence of a purely negative character, however, is admissible. yvT u Example:- A brings an action to recover a sum of money advanced as a loan, alleging that he lent a certain sum of money, at a certain time, and at a certain place, to a certain person. If conclusively substantiated evidence is given proving that A was not in that place at that time, but was elsewhere, such evidence is admissible and the plaintiff's case will be dismissed.

- 1700. It is a condition precedent to giving evidence that the witness should be entirely impartial. Consequently, evidence by an ascendant on behalf of a descendant or of a descendant on behalf of an ascendant, that is to say, the evidence of a father and a grandfather and of a mother and a grandmother on behalf of their children and grandchildren and of children and grandchildren on behalf of their father and grandfather and mother and grandmother, and one of the spouses on behalf of the other, is not admissible. Subject to these exceptions, however, the evidence of relations on behalf of one another is admissible. The evidence of a man who is maintained at some other person's expense, and that of a person in the salaried employment of another on behalf of such person, is inadmissible. The evidence of fellow servants on behalf of one another, however, is admissible. Again, the evidence of partners on behalf of each other in respect to the partnership property, and of a surety in respect to payment by the principal of the sum for which he stood surety, is inadmissible. In other matters, however, the evidence of such persons on behalf of one another is admissible.
- 1701. The evidence of a person on behalf of his friend is admissible. But if the bonds of friendship uniting them are such that they use each other's property, such evidence is inadmissible.
- 1702. It is a condition precedent to the validity of the evidence that there should be no enmity of a temporal nature between the witness and the person against whom he gives evidence. Enmity of a temporal nature is ascertained by reference to custom.
- 1703. A person cannot be both plaintiff and witness. Consequently, the evidence of a guardian on behalf of an orphan and of an agent on behalf of his principal is inadmissible.
- 1704. A person may not give evidence of his own acts. Consequently, agents and brokers may not give evidence as to any sales effected by them. Similarly, if the judge of a town who has retired gives evidence as to a judgement delivered by him before his retirement, such evidence is inadmissible. But if he gives evidence after his retirement as to an admission made before him prior to his retirement, such evidence is valid.
- 1705. A witness must be an upright person. An upright person is one whose good qualities are greater than his bad qualities. Consequently, the evidence of persons who habitually behave in a manner inconsistent with honour and dignity, such as dancers and comedians, and persons who are known to be liars, is inadmissible.

SECTION IV. RELEVANCY OF EVIDENCE TO THE POINT AT ISSUE IN THE ACTION.

- 1706. Evidence is admissible if it agrees with the nature of the claim and not otherwise. There is no necessity, however, for mere conformity as to the language employed. It is enough if there is conformity in fact. yvT
Examples:-
(1). The action concerns an object deposited for safekeeping and witnesses give evidence that the defendant has admitted the deposit; or the action concerns wrongful appropriation of property and witnesses give evidence that the defendant has admitted the wrongful appropriation. The evidence is admissible.
(2). A debtor alleges in Court that he has paid his debt. Witnesses give evidence that the creditor released the debtor from payment. The evidence is admissible.
- 1707. The evidence must agree with the claim, whether such evidence goes to the whole or to part only of such claim. yvT x Examples:-
(1). A brings an action alleging that certain property has belonged to him for the last two years. Witnesses give evidence that such property has belonged to A for the last two years. Such evidence is admissible. It is also admissible if they give evidence that such has belonged to A for one year.
(2). The plaintiff's claim is for one thousand piastres. Witnesses give evidence as to five hundred. Their evidence in regard to the five hundred is valid.
- 1708. Evidence in respect to more than is claimed is inadmissible. If, however, the divergence between the claim and the evidence is in fact capable of explanation and the plaintiff does so explain such divergence, the evidence is admissible. Examples:-
(1). A brings an action alleging that certain property has been his for the last two years. Witnesses give evidence that such property has belonged to him for the last three years. The evidence is inadmissible.
(2). The plaintiff's claim is for five hundred piastres. Witnesses give evidence as to one thousand piastres. The evidence is inadmissible. But if the plaintiff, by explaining that at one time one thousand piastres were in fact due to him from the defendant, but that five hundred piastres of that amount have since been repaid, of which the witnesses were unaware, shows that the action is in conformity with the evidence of the witnesses, the evidence of such witnesses is admissible.
- 1709. If the plaintiff brings an action for absolute ownership without stating how he became possessed of the property, alleging, for example, that a vineyard belongs to him, and witnesses give evidence as to the origin of the ownership, stating from whom the plaintiff bought the vineyard, the evidence is admissible. Thus, if the witnesses give evidence as to ownership arising from a definite cause and the Court asks the plaintiff as to whether his claim to the property arises from that cause or from some other, and the plaintiff replies that he does in fact claim the property by reason of such cause, the Court shall accept the evidence given by the witnesses. If, however, the plaintiff states that his claim is based upon some other cause, or that it is not based on that cause, the Court shall reject the evidence of the witnesses.
- 1710. A plaintiff may validly bring an action claiming ownership arising out of some definite cause, as for example, in the case of a vineyard. If the plaintiff, without mentioning the vendor, states that he has purchased such vineyard, or without stating the details, merely alleges that he has bought such a vineyard from a certain person, such action shall be considered to be an action for absolute ownership; and if the witnesses give evidence that the vineyard in question is the plaintiff's absolute property, such evidence is admissible. If the witnesses, however, give evidence as to absolute ownership of property, stating that the plaintiff bought such property from a certain person and describe the vendor, such evidence is inadmissible. The reason for this is that once an absolute right of ownership is established, the effect thereof is retrospective and will extend to matters incidental to such thing. For example, the fruit formerly produced by the vineyard also becomes the property of the plaintiff. If the right of ownership arises out of some definite cause, however, it can only be effective as from the date upon which such right arose, for example, as from the date of the sale. Consequently, a right of absolute ownership is more extensive than a right of ownership arising out of some definite cause and thus the witnesses have given evidence for more than the plaintiff has demanded.
- 1711. Evidence given in an action with regard to debt which is contrary to the claim is inadmissible. yvT Examples:-
(1). The plaintiff claims payment of one thousand piastres alleged to be due to him as the price of a sale. If the witnesses give evidence to the effect that the defendant owes such sum in respect to a loan, their evidence is inadmissible.
(2). The plaintiff claims that certain property has devolved upon him by way of inheritance from his father. Witnesses give evidence that the property has devolved upon him by way of inheritance from his mother. The evidence is inadmissible.

SECTION V. CONTRADICTORY EVIDENCE.

- 1712. The evidence of witnesses which is contradictory in respect to the matter regarding which the evidence is given, is inadmissible. yvT Example:- One witness gives evidence in respect to a thousand piastres gold; another witness gives evidence as to one thousand piastres in silver MEDJIDIES. Their evidence is inadmissible.
- 1713. If there is a contradiction in the evidence given by witnesses regarding matters incidental to the subject matter of their evidence and such contradiction extends to the subject matter of the evidence itself, such evidence is inadmissible. If the contradiction with regard to the incidental matter does not affect the subject matter of the evidence, however, the evidence is admissible. Consequently, if the evidence is given with regard to a mere fact, such as wrongful appropriation, or payment of a debt, and one witness gives evidence that the thing was done at another time or another place, such evidence is admissible, since the conflict of evidence shows a discrepancy to exist concerning the subject matter of the action. As regards matters, however, which are placed on record, such as sale, purchase, hire, suretyship, transfer of debt, gift, pledge, debt, loan, release and testamentary disposition, any contradiction of witnesses as to circumstances of time or place will not affect the validity of the evidence, since such contradiction does not affect the subject matter of the evidence. yvT z Example:- A asserts that he has paid a debt due. One witness gives evidence that A paid such debt in his house. Another witness gives evidence that A paid the debt in his shop. The evidence of the witnesses is inadmissible. But if a person brings an action in Court claiming property in possession of some third person, asserting that such person sold him the property for a certain sum of money and claims delivery thereof, and one witness gives evidence that such property was sold in a certain house and the other that it was sold in a shop, such evidence is admissible, since an act once performed cannot be repeated, but a matter put on record can be repeated.
- 1714. Should witnesses contradict each other as regards the colour of property wrongfully appropriated, or whether it is of the male or female sex, their evidence is inadmissible. yvT r Example:- Wrongfully appropriation of an animal. A witness gives evidence to the effect that the animal is a grey horse. Another witness states that the animal is a dark-brown horse. Another witness states that it is a chestnut horse. Another witness states that it is a horse, while yet another states that it is a mare. The evidence of these witnesses is inadmissible.
- 1715. Contradictions as to the amount of the price in the evidence of witnesses in an action on a contract renders such evidence inadmissible. yvT ' Example:- One witness gives evidence stating that certain property was sold for five hundred piastres and another witness that it was sold for three hundred piastres. Their evidence is inadmissible.

SECTION VI. INQUIRY INTO THE CREDIBILITY OF WITNESSES.

- 1716. When witnesses have given evidence, the Court shall ask the person against whom evidence has been given whether he considers that the witnesses told the truth when giving their evidence. If such person states that he considers the witnesses are truthful or straight-forward as regards the evidence they have given, he has taken to have admitted the matter in issue, and judgement is given on his admission. If, however, he states that the witnesses have given false evidence, or that, while being upright persons, they are mistaken in regard to such matters or have forgotten the matter, or while admitting that the witnesses are upright persons, at the same time denies the matter in issue, judgement shall not be given =, but the Court shall take steps to ascertain, both publicly and privately, whether the witnesses are upright or not.
- 1717. The inquiry as to the credibility of witnesses shall be addressed either publicly or privately to the person having authority over such witnesses. Thus, if the witnesses are students, the inquiry shall be addressed to the teacher of the school in which they are carrying on their studies, as well as from reliable inhabitants. If they are soldiers, from the officers and clerks of their battalion. If the witness is a clerk, from his superiors and from his fellow clerks in the office. If a merchant, from reliable persons who are also merchants. If a member of a guild, from the warden of such a guild and the members of the committee thereof. If he belongs to any other class, then from reliable inhabitants of the district or village.
- 1718. A private inquiry as to the credibility of a witness is called in technical legal language a sealed writing. The Court shall insert in the document the name of the plaintiff and defendant, the subject matter of the action, the names and descriptions of the witnesses, their profession, their identity, their place of residence, the names of their fathers and their grandfathers, or their names only if they are persons of note, together with their description, adding finally anything which will differentiate the witnesses from any other persons. The document shall then be sealed and placed in an envelope and sent to the persons selected to give information as to the credibility of the witnesses. If such persons, after perusal of the document, consider that the witnesses whose names are written therein are trustworthy, they shall state in writing under the names of the witnesses in question that they consider them to be trustworthy. They shall then sign the document and return it to the Court, sealing the envelope without allowing the person who has brought the document, or any other person, to ascertain the contents thereof.
- 1719. If the persons to whom the document is addressed for the purpose of giving the information fail to certify in writing that the witnesses are upright and that their evidence is admissible, or if in fact they state that they are not upright, or that they do not know them, or that they know nothing of the condition of such persons, or that it is matter beyond their knowledge, or make some similar statement either directly or by implication, the effect of which is that they are unable to certify the uprightness of the witnesses, or if they return the documents to the Court duly sealed, but without having written anything thereon, the Court shall not accept such evidence. Upon the occurrence of such an event, the Court shall not tell the plaintiff that his witnesses are disqualified for giving evidence, but shall merely instruct him to produce other witnesses if he has any. If the document states, however, that the witnesses are trustworthy and that their evidence is admissible, a public enquiry shall thereupon be instituted as to the credibility of the witnesses.
- 1720. The public inquiry as to the credibility of witnesses is conducted as follows: the persons called upon to give the information are brought before the Court and the inquiry is made in the presence of the two parties; or the two parties, accompanied by a person specially deputed for that purpose, proceed to the place where the persons called upon to give the information reside, and the inquiry takes place publicly in their presence.
- 1721. Although in the case of a private inquiry one person may validly be selected to give information as to the credibility of witnesses, at least two should be appointed out of consideration of prudence.
- 1722. A public inquiry is in the nature of evidence. Consequently, the rules relating to evidence and the number of witnesses are applicable in this case also. It is unnecessary, however, for the persons selected to give informations to the credibility of the witnesses, to use the word evidence.
- 1723. If, in the opinion of the Court, the credibility of the witnesses has been proved in one particular case, the Court need not again inquire into the credibility of the same witnesses, if they give evidence with regard to some other matter before the expiration of a period of six months from the date on which they last gave evidence. If more than six months have passed, however, the Court must again proceed to the enquiry.
- 1724. If either before or after the inquiry into the credibility of witnesses, the person against whom the evidence is given attacks the witnesses, alleging that they are giving their evidence for some ulterior motive, such as avoiding a loss or realising a gain, the Court shall call upon him to furnish proof of his allegations. If such person is able to prove his case by evidence, the Court shall reject the evidence of such witnesses. If not, the Court shall hold an inquiry into the credibility of the witnesses, if this has not already been done. If an inquiry has in fact been held, the Court shall give judgement in accordance with the evidence.
- 1725. In the event of some of the persons selected to give information as to the credibility of witnesses reporting against them and of others reporting in their favour, the Court shall give preference to the hostile report and shall refrain from giving judgement thereon.
- 1726. In the event of the decease or disappearance of witnesses who have given evidence in civil matters, the Court may still hold an inquiry into the credibility of their evidence and give judgement accordingly.

APPENDIX. SWEARING WITNESSES.

- 1727. Should the person against whom evidence is given ask the Court, before giving judgement, to put the witnesses on their oath that their evidence is not false, the Court may, if it deems it necessary, strengthen their evidence by administering the oath. The Court may inform the witnesses that their evidence will not be accepted unless they swear the oath.

SECTION VII. WITHDRAWAL OF EVIDENCE.

- 1728. Should witnesses who have given evidence in Court, such evidence is considered not to have been given and the witnesses shall be reprimanded.
- 1729. Should witnesses who have given evidence in Court withdraw such evidence after judgement has been delivered, the judgement stands, but the witnesses must pay the value of the subject matter of the action to the party against whom judgement has been given. (See Article 80).
- 1730. Should any of the witnesses withdraw their evidence as mentioned above, the evidence required being given by the others, those who withdraw need not pay the value of the subject matter of the action, but shall be reprimanded only. If the number of witnesses, however, is not enough to give the evidence required, half the value of the subject matter of the action must be paid by the witness who has withdrawn, if there is one only, or if there are more than one, then by them all in equal shares.
- 1731. A withdrawal of evidence, to be valid, must be made in Court. Any withdrawal made elsewhere is invalid. Consequently, a person against whom evidence is given will not be heard to allege that the witnesses have withdrawn their evidence out of Court. A witness who has given evidence in one Court may validly withdraw his evidence in another Court.

SECTION VIII. CONCLUSIVELY SUBSTANTIATED EVIDENCE.

- 1732. No importance is paid to the mere number of witnesses; that is to say, that if one of the parties has more witnesses than the other, he will not be preferred for that reason alone. If the number of witnesses, however, is so large that they conclusively substantiate the evidence, they will be preferred.
- 1733. Conclusively substantiated evidence is tantamount to positive knowledge.
- 1734. There is no necessity for the word "evidence" to be used in cases of conclusively substantiated evidence and there is also no need to insist that the witnesses should be of upright character. Consequently, there is no need for an inquiry as to the credibility of such persons.
- 1735. No definite number of persons is necessary to constitute conclusively substantiated evidence. There number must be so considerable, however, that it would be contrary to reason to conclude that they had agreed to tell a lie.

CHAPTER II. DOCUMENTARY EVIDENCE AND PRESUMPTIVE EVIDENCE.

SECTION I. DOCUMENTARY EVIDENCE.

- 1736. No action may be taken on writing or a seal alone. If such writing or seal is free from any taint of fraud or forgery, however, it becomes a valid ground for action, that is to say, judgement may be given thereon. No proof is required in any other way.
- 1737. The Sultan's rescript, and entries in the land registers are considered to be conclusive, since they are not tainted by fraud.
- 1738. As is set forth hereinafter in the Book relating to the Administration of justice by the Courts, registers kept by the Courts in such a way as to be free from any irregular practice or deception are considered to be conclusive.

- 1739. Documents instituting a pious foundation are not in themselves considered to be conclusive. If registered, however, in Court registers which are reliable as stated above, they are then considered to be conclusive.

SECTION II. PRESUMPTIVE EVIDENCE.

- 1740. A presumption is also a ground for judgement.
- 1741. A presumption is an inference which amounts to positive knowledge.yvT C Example:- A is seen leaving an empty house precipitately with a blood-stained knife in his hand. B thereupon enters the house and find C, who had just had his throat cut. It is certain that A is the murdered of C. No attention is paid to any mere possibility such as the possibility that C killed himself. (See [Article 74](#)).

CHAPTER III. ADMINISTERING THE OATH.

- 1742. One ground of judgement is taking or refusing to take the oath. Thus, should the plaintiff be unable to prove his case, the defendant shall take an oath at the instance of the plaintiff. If A, however, brings an action against B asserting that B is the agent of some third person, and B joins issue, it is not essential for B to be put on oath. Similarly, should two persons bring an action both asserting that they have bought from C property in the possession of C, and C later admits that he has sold the property of one of them but joins issue with the other, the oath shall not be administered to him. In this connection,hire, and receiving a pledge or a gift, are assimilated to purchase.
- 1743. Should it be intended to put one of the parties on his oath, he shall be caused to take the oath in the name of Allah.
- 1744. The oath may be sworn only before the Court or before some person representing the Court. A refusal to take oath before any other person is of no effect.
- 1745. A representative may validly be employed to place a person upon oath, but no substitution is permissible in swearing an oath. Consequently, the advocate of a party in an action may place the other party upon his oath, but when his client is put upon his oath, such client must swear the oath personally and not through his advocate.
- 1746. The oath is only administered upon the application of the opposite party. In four cases, however, the oath is administered by the Court without any application:-
 (1).When a person lays claim to and proves that he has an interest in the estate of a deceased person, the Court shall require the plaintiff to swear an oath that he has not received anything in any way whatsoever in satisfaction of his interest from such deceased person, either directly or indirectly, nor that he has given a release thereof, nor transferred it to any other person, nor received anything in satisfaction thereof from any other person, nor received any pledge by way of security for his interest from the deceased person. Such form of oath is known as ISTIZHAR.
 (2). When a person appears claiming to be entitled to certain property and proves his case, the Court shall require an oath to be taken by such person that he has not sold such property, nor disposed of it by way of gift, nor divested himself in any way of the property therein.
 (3). When a person wishes to return a thing purchased on account of defect, the Court shall require him to take an oath that he did not, either expressly or impliedly, by reason of any disposition of such a thing as if it were his own property-- as is set forth in Article 344-- assent to the defect in the thing purchased.
 (4). When the Court is about to give judgement in a case of pre-emption, the Court shall require the person claiming the right of pre-emption to swear an oath that he has not waived the right of pre-emption in any way whatsoever.
- 1747. If the defendant swears the oath at the instance of the plaintiff without the oath being administered by the Court, such oath is of no effect and must again be administered by the Court.
- 1748. When a person is about to swear an oath concerning his own act, he must swear such oath positively, stating that the matter is so, or is not so. But when a person is about to swear an oath concerning the act of some other person, he must be made to swear that he has no knowledge of such matter, that is to say, that he does not know such thing.
- 1749. The oath has reference either to cause or to effect. Thus, an oath that a certain thing has or has not happened is an oath as to cause; and an oath as to whether a thing is still continuing or not is an oath as to effect.yvT _ Example:- An oath in an action for sale and purchase to the effect that the contract of sale was never made at all is an oath as to cause; but an oath as to whether the contract is still continuing is an oath as to effect.
- 1750. When different action are joined together, one oath is sufficient. there is no necessity for a separate oath in each case.
- 1751. When in a civil action the oath is duly tendered to a person who is called upon to take the oath and such person refuses to take the oath, either expressly by refusing to swear, or impliedly by keeping silence without excuse, the Court shall give judgement on such refusal. If such person seeks to swear an oath after judgement has been delivered, the Court shall pay no attention thereto, and the judgement shall remain intact.
- 1752. A dumb man may validly take or refuse to take the oath by use of general recognised signs.

SUPPLEMENT.

- 1753. A plaintiff who has stated that he has no witnesses will not be heard to say that he intends to call witnesses. And if he has stated that he intends to call a certain witness and no other, he will not be allowed to call any other witness.

CHAPTER IV. PREFERRED EVIDENCE AND ADMINISTRATION OF THE OATH TO BOTH PARTIES.

SECTION I. ACTIONS REGARDING POSSESSION.

- 1754.In the case of a dispute relating to real property, possession thereof must be proved by evidence. Judgement will not be given that the defendant is in possession merely as the result of the affirmation of the two parties, that is, an admission made by the defendant in reply to the plaintiff,s claim. If the plaintiff, however, brings an action alleging that he has brought certain real property from a certain person, or that a certain person has wrongfully deprived the plaintiff of possession thereof, there is no need for the defendant to prove by evidence that he is in possession of such property. Again, if movable property is in the possession of a person, he is the possessor thereof, and there is no need for proof of that fact by evidence as stated above. The statement of the two parties on this point is sufficient.
- 1755. In the event of a dispute arising between two persons in respect to real property, each alleging that he is in possession of such property, the parties shall first of all be required to prove by evidence which of them is in possession. Should both parties produce evidence proving that they are in possession, such proof is taken to mean that they are in joint possession. Should one of the parties be unable to prove that he is in possession, while the other produces satisfactory proof thereof, judgement is given for possession in favour of the latter, and the former is considered to be out of possession. If neither party is able to prove that he is in possession, either may demand that the oath be administered to his opponent to the effect that he is not in possession of such real property. If both refuse to take the oath, they are taken to be jointly in possession of such property. If one person takes an oath, the other refusing to do so, judgement shall be given that the person taking the oath is in sole possession of such property and the other is considered to be out of possession. If both persons take oath, judgement shall be given that neither is in possession, and the real property in question shall be seized until such time as the true facts are established.

SECTION II. PREFERRED EVIDENCE.

- 1756. If two persons are joint owners of certain property, that is to say, if the two are in joint possession thereof, and bring an action, one party alleging that such property belongs to him alone, the other alleging that he is joint owner thereof, the evidence given of sole ownership shall be preferred. That is to say, if the two parties produce evidence in support of their case, the evidence of the person claiming absolute ownership is preferred to that of the person claiming joint ownership. If both of them claim to be absolute owners and produce evidence in support thereof, judgement shall be given that they are joint owners thereof. If one of the parties can produce no evidence and the other proves his case, judgement shall be given that the latter is sole owner of such property.
- 1757. In an action for absolute ownership, the evidence of the person not in possession is preferred if no date is mentioned.yvT | Example:- A brings an action with regard to a house in the possession of B, alleging that the house is his property and that B is wrongfully in possession thereof and asking that B should be evicted and the house restored to him. If B alleges that the house is his property and that consequently he is lawfully in possession thereof, the evidence of A will be preferred and heard.
- 1758. Actions relating to ownership arising from causes which are capable of repetition, as for example purchase, are regarded as identical with actions arising out of absolute ownership, if the date is not mentioned. In such cases, also the evidence of the person who is not in possession is preferred to that of the person in possession. Should both parties, however, claim that their right of ownership is held from one and the same person, the evidence of the person in possession is preferred.yvT L Example:- A brings an action claiming a shop in the possession of B, alleging that he bought such shop from one Veli Agha, and that B in this connection wrongfully took possession of the shop. B comes into Court and alleges that he bought the shop from one Bakir Effendi, or that he inherited it from his father, which is the reason for his being in possession. The evidence of A, the person not in possession, is preferred and heard. But if B, the person in possession, alleges that he bought the shop from Veli Agha, B's evidence is preferred to that of A, the person not in possession.

- 1759. In actions relating to ownership arising out of a cause which is incapable of repetition, as in the case of an animal giving birth to young, evidence of the person in possession is preferred. Consequently, in the event of a dispute relating to a colt between a person not in possession and one who is, and each party alleges that the colt is his property born from his own mare, the evidence of the person in possession is preferred.
- 1760. in a claim for ownership dependent on date, the evidence of the person giving the earliest date will be preferred.yvT U Example:- A brings an action relating to a plot of land in the possession of B, alleging that he bought such land a year ago from C. B by his answer states that the land developed upon him by way of inheritance from his father, who died five years ago. The evidence of the person in possession is preferred. But if B states that he inherited the land from his father who died six months ago, the evidence of the person not in possession is preferred. If each of the two parties alleges that he has bought the subject matter of the action from different persons, and each gives the date at which the person selling to them acquired the thing in question, the evidence given by the person giving the earliest dates will be preferred.
- 1761. In actions relating to the young of animals, no attention is paid to date, the evidence of the person in possession being preferred, as stated above. But if there is a discrepancy between the age of the animal which is the subject of the action and the date given by the person who is not in possession, the evidence of the latter is preferred. If the age of the animal is unknown, however, or if it is different from either date given, the evidence of neither is accepted, and the animal shall not be taken away from the person in possession.
- 1762. The greater claim is preferred.yvT - Example:- Vendor and purchaser disagree as to the quality or price of the thing sold. The evidence given by the party claiming most will be preferred.
- 1763. Evidence as to ownership is preferred to evidence as to loan for use.yvT Example:- A claims the return of property in the possession of B, alleging that he lent the property to B for B's use. B by his reply alleges that A sold the property to him or bestowed it upon him by way of gift. The evidence as to the sale of the gift is preferred.
- 1764. Evidence as to sale is preferred to evidence as to gift, or pledge, or hire, and the evidence of hire to the evidence of pledge.yvT Example:- A demands payment for certain property from B, which A alleges he sold B. B replies that A made a gift of such property to him and gave delivery thereof. The evidence of sale is preferred.
- 1765. In cases of a loan for use, the evidence in favour of a general loan is preferred.yvT Example :- A lends his horse to B to use. The horse dies while in the possession of B. A sues B for the value of the horse, alleging that he lent B the horse for a period of four days and on the fifth day it died without having been returned. B by his reply alleges that A did not limit the loan of the horse to a period of four days, but made the loan in general terms. The evidence of the person to whom the horse was lent is preferred.
- 1766.Evidence given as to good health is preferred to evidence given as to a mortal sickness.yvT 8 Example:- A makes a gift to one of his heirs and dies. Another heir alleges that the gift was made during the course of a mortal sickness. the person in whose favour the gift was made alleges that the gift was made while in good health. The evidence of the person in whose favour the gift was made is preferred.
- 1767. Evidence of soundness of mind is preferred to evidence of madness or imbecility.
- 1768. In the event of evidence being given concurrently as regards new and old things the evidence as to the new things is preferred.yvT Example:- A possesses a right of flow upon the lands of B held in absolute ownership. A difference of opinion arises between them as to whether such right is of ancient or recent origin. The owner of the house alleges that it is of recent origin and demands the extinction of the right. The owner of the right of flow claims that such right is of ancient origin. The evidence of the owner of house is preferred.
- 1769. In the event of the person whose evidence is preferred being unable to prove his case by production of evidence, evidence is asked for from the person whose evidence has not been preferred. If he proves his case, his evidence shall be accepted; if he fails to do so, the oath shall be administered to him.
- 1770. In the event of the person whose evidence is preferred being unable to prove his case by the production of evidence as stated above, and if the party whose evidence is not preferred produces evidence, judgement shall be given in his favour. If the person whose evidence has been preferred wishes to produce evidence thereafter, such evidence shall not be heard.

SECTION III. PERSONS WHOSE EVIDENCE IS PREFERRED. JUDGEMENT BASED ON CIRCUMSTANTIAL EVIDENCE.

- 1771. If a husband and wife disagree as to the things in the house in which they dwell, the nature of the things must be examined. In the case of things suitable for the husband only, such as gun or a sword, or of things suitable for both, such as domestic utensils and furniture, the evidence of the wife is preferred. If both are unable to advance any proof, the husband may make a statement on oath. That is to say, if he states on oath that the things in question do not belong to his wife, judgement shall be given in his favour.
The evidence of the husband is preferred as regards things suitable for women only, such as clothing and jewellery. If both are unable to advance any proof, the wife may make a statement on oath. If one of the two makes and sells things which are suitable for the other, that person in any case may make a statement on oath.yvT , Example :- An earring is a piece of jewellery suitable for a woman. If the husband is a jeweller, he may make a statement on oath.
- 1772. Upon the death of one of the spouses, the heir stands in the place of the person from whom he inherits. If the two parties, as stated above, are unable to produce any proof as regards things suitable for both, the surviving spouse may make a statement on oath. Should both spouses have died at the same time, the heir of the husband may make a statement on oath as regards things suitable for both of them.
- 1773. Should a donor wish to revoke a gift and the beneficiary alleges at the trial of the action that the subject matter of the gift has been destroyed, the beneficiary may make statement not on oath.
- 1774. A person to whom a thing has been entrusted for safekeeping shall make a statement on oath as regards any question of his release from liability. Thus,if a person who has entrusted his property to another for safekeeping, brings an action against such person, and the latter by his reply alleges that he has returned the thing entrusted to him for safekeeping, such person shall make a statement on oath. But if he wishes to bring evidence in order not to swear an oath, such evidence shall be heard.
- 1775. If a person is indebted to another in respect to various sums of money and such person makes a payment to the creditor and an action is brought to determine in respect to which particular debt the payment has been made, the debtor shall make a statement.
- 1776. If a lessee of a mill seeks to deduct a portion of the rent of such mill after the expiration of the term of the lease by reason of the water having been cut off for a certain period during the currency of the lease and the lessor and lessee disagree thereon, and there be no evidence available, the nature of the case must be examined.
If the point at issue is the period of time during which the water was cut off, for example, if the lessee claims that it was ten days and the lessor five only, the lessee may make a statement on oath.
If the point at issue is as to whether the water has been cut-off at all, that is to say, if the lessor absolutely denies that the water was cut off, judgement shall be given based on the circumstantial evidence of the case. Thus, if the water is running at the time the action is instituted and heard, the lessor shall make a statement on oath. If the water is not running at the time, the lessee shall make a statement on oath.
- 1777. If a dispute arises as to whether the channel along which water is flowing to a person's house is old or new, and the owner of the house alleges that it is new and wishes to remove it neither party can produce any evidence, the nature of the case must be examined. If the water is flowing at the time the case is instituted, or if it is a well-known fact that the water was flowing there formerly, no change shall be made in such channel. The owner of the channel may make a statement on oath, that is to say, he shall be caused to take an oath that the channel is not new.
If at the time the case was instituted there was no water running in the channel and it is not known whether water flowed there formerly, the owner of the house may make a statement on oath.

SECTION IV. ADMINISTRATION OF THE OATH TO BOTH PARTIES.

- 1778. If a dispute occurs between vendor and purchaser as to the amount of the price, or the amount of the thing sold, or both, or as to the description or type thereof, judgement is given in favour of whichever of the two produces evidence. If both of them produce evidence, judgement is given in favour of the party who produces evidence for the greater amount.
If neither of the parties can prove their case, they shall be informed that either one party must admit the claim of the other, or the sale will be declared void. If neither party admits the claim of the other, the Court shall put each party upon his oath as to the claims of the other party, beginning with the purchaser. If either party refuses to take the oath, the other is taken to have proved his case. If both parties swear an oath, the Court shall declare the sale void.
- 1779. If a person taking a thing on hire has a dispute with a person giving a thing on hire with regard to the amount of the rent before taking possession of the thing hired, and an action is instituted in Court in connection therewith, judgement shall be given in favour of the person who produces evidence, as, for example, where the person taking the thing on hire alleges that the rent is so much and the person giving the thing on hire alleges that the rent is so much.
If both produce evidence, judgement shall be given in favour of the person giving the thing on hire.
If neither of the parties can prove their case, both of them are put on oath, beginning with the person taking the thing on hire, judgement being given against the person who

refuses to take the oath.

If both parties take the oath, the Court shall declare the contract of hire to be void.

Should a dispute arises as to any question of time or distance, the matter shall be dealt with in the same manner. Provided, however, that if both parties produce evidence, judgement shall be given on the evidence of the person taking the thing on hire. If the oath is administered to both parties, the person giving the thing on hire shall first be put on oath.

- 1780. In the event of a dispute arising between the person giving and the person taking a thing on hire, as is set forth in the preceding Article, after the period of the contract of hire has expired, the oath is not administered to both parties. The person taking the thing on hire alone may make a statement on oath.
- 1781. If the person giving a thing on hire and the person taking a thing on hire have a dispute as to the amount of the rent during the period of the contract of hire, both parties shall be put on oath, and the contract cancelled as regards the remainder of the period. The person taking the thing on hire may make a statement as to the portion relating to the period which has elapsed.
- 1782. If a dispute arises between vendor and purchaser as to a thing sold which has been destroyed while in the possession of the purchaser, or if a defect of recent origin has been revealed which prevents such thing being returned, the oath is not administered to both parties, but to the purchaser only.
- 1783. If an action is brought with regard to the due date of any particular thing, that is to say, whether the time for the performance of such thing has arrived or not, or with regard to a right of option, or as to whether the whole amount or part only of the price has been received, the oath is not administered to both parties, but in these three cases only to the person who denies.

PROMULGATED BY ROYAL IRADAH, 26TH SHAABAN, 1293.